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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/992,221	11/06/2001	Tomohiro Tsuji	3029-75	7242

7590

10/06/2003

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EXAMINER

WEBER, JON P

ART UNIT

PAPER NUMBER

1651

DATE MAILED: 10/06/2003

Please find below and/or attached an Office communication concerning this application or proceeding.

Advisory Action

Application No.

09/992,221

Applicant(s)

TSUJI ET AL.

Examiner

Jon P Weber, Ph.D.

Art Unit

1651

--The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

THE REPLY FILED 03 September 2003 FAILS TO PLACE THIS APPLICATION IN CONDITION FOR ALLOWANCE. Therefore, further action by the applicant is required to avoid abandonment of this application. A proper reply to a final rejection under 37 CFR 1.113 may only be either: (1) a timely filed amendment which places the application in condition for allowance; (2) a timely filed Notice of Appeal (with appeal fee); or (3) a timely filed Request for Continued Examination (RCE) in compliance with 37 CFR 1.114.

PERIOD FOR REPLY [check either a) or b)]

- a) ☐ The period for reply expires _____ months from the mailing date of the final rejection.
- b) ☒ The period for reply expires on: (1) the mailing date of this Advisory Action, or (2) the date set forth in the final rejection, whichever is later. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of the final rejection. ONLY CHECK THIS BOX WHEN THE FIRST REPLY WAS FILED WITHIN TWO MONTHS OF THE FINAL REJECTION. See MPEP 706.07(f).

Extensions of time may be obtained under 37 CFR 1.136(a). The date on which the petition under 37 CFR 1.136(a) and the appropriate extension fee have been filed is the date for purposes of determining the period of extension and the corresponding amount of the fee. The appropriate extension fee under 37 CFR 1.17(a) is calculated from: (1) the expiration date of the shortened statutory period for reply originally set in the final Office action; or (2) as set forth in (b) above, if checked. Any reply received by the Office later than three months after the mailing date of the final rejection, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

1. ☐ A Notice of Appeal was filed on _____. Appellant's Brief must be filed within the period set forth in 37 CFR 1.192(a), or any extension thereof (37 CFR 1.191(d)), to avoid dismissal of the appeal.
2. ☐ The proposed amendment(s) will not be entered because:
- (a) ☐ they raise new issues that would require further consideration and/or search (see NOTE below);
- (b) ☐ they raise the issue of new matter (see Note below);
- (c) ☐ they are not deemed to place the application in better form for appeal by materially reducing or simplifying the issues for appeal; and/or
- (d) ☐ they present additional claims without canceling a corresponding number of finally rejected claims.

NOTE: _____.

3. ☐ Applicant's reply has overcome the following rejection(s): _____.
4. ☐ Newly proposed or amended claim(s) _____ would be allowable if submitted in a separate, timely filed amendment canceling the non-allowable claim(s).
5. ☒ The a) ☐ affidavit, b) ☐ exhibit, or c) ☒ request for reconsideration has been considered but does NOT place the application in condition for allowance because: see attachment.
6. ☐ The affidavit or exhibit will NOT be considered because it is not directed SOLELY to issues which were newly raised by the Examiner in the final rejection.
7. ☐ For purposes of Appeal, the proposed amendment(s) a) ☐ will not be entered or b) ☐ will be entered and an explanation of how the new or amended claims would be rejected is provided below or appended.

The status of the claim(s) is (or will be) as follows:

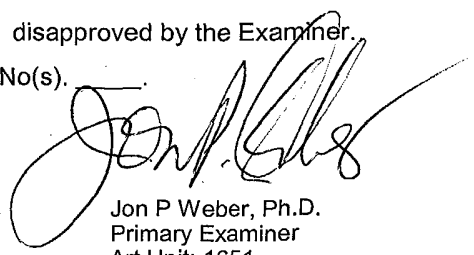
Claim(s) allowed: _____.

Claim(s) objected to: _____.

Claim(s) rejected: _____.

Claim(s) withdrawn from consideration: _____.

8. ☐ The proposed drawing correction filed on _____ is a) ☐ approved or b) ☐ disapproved by the Examiner.
9. ☐ Note the attached Information Disclosure Statement(s) (PTO-1449) Paper No(s).
10. ☐ Other: _____


Jon P Weber, Ph.D.
Primary Examiner
Art Unit: 1651

It is argued that the rejection under 103 is improper because: 1) it has not been established on the record that cell size measurement by light scattering and aperture impedance are known in the art to be functional equivalents, 2) that absorbance and fluorescence are theoretically and physically different from each other and therefore not equivalents.

In rebuttal to the first point examiner offers two references as examples: 1) Coulter (US 2,656,508) and 2) Zelmanovic et al. (US 5,817,519). Coulter, issued in 1953, is the first description of the aperture impedance method of determining cell size. Clearly, this technique is old and well known in the art. Zelmanovic et al. state clearly at column 2 that two cell counting/sizing methods are currently used in the art of blood cell counting: light scattering and aperture impedance. Hence, the methods are old and well known in the art and clearly recognized as functional equivalents by persons of ordinary skill in the relevant art.

In rebuttal to the second point, it is noted that in both cases what is being detected is the dye used to stain the cells. When a fluorescent dye is used, fluorescence would be the natural physical method of detection. When a colored dye is used, absorbance would be the natural physical method of detection. Hence, the method of detection is adapted to the dye used for detection. The theoretical and physical differences between fluorescence and absorbance are not at issue here. The person of ordinary skill in the art would know to adapt the physical detection method to the specific dye being detected.

Applicant's arguments filed 03 September 2003 have been fully considered but they are not persuasive. The rejection under 35 U.S.C. 103 is adhered to for the reasons of record and the additional reasons above.
